No. 10964

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

PETITION FOR REHEARING

S. J. O'BRIEN,
Attorney for Appellant.

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JOHNSON-COX CO. PRINTERS TACOMA

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TABLE OF CASES

Comes now the appellant herein and petitions the court for a rehearing herein for the following reasons and upon the following grounds:

1. Because the case was decided upon a point not raised by the government either in its brief or upon the oral argument;

2. Because the opinion incorrectly states the evidence;

3. Because in any event the point upon which the case was decided was erroneously determined and without giving to appellant any opportunity to be heard thereon.

The briefs in the case, as is stated in the per curiam opinion of the court, considered two legal questions: (1) Whether the introduction of a certain telegram to the President, alleged to have been sent by appellant, was error; and (2) whether testimony of certain advice of counsel given to appellant should have been admitted.

It was not contended by the government that, if the telegram was erroneously admitted, the error was not prejudicial. The first suggestion along that line came in the oral argument when the court orally inquired of counsel for appellant whether there was not evidence enough in the record which was sufficient to justify a verdict of guilty. Inasmuch as no motion in arrest of judgment was made and no contention made in the

assignments of error or appellant's brief challenging the sufficiency of the evidence, if the jury believed it, obviously the question was answered without asking it of counsel in open court and then quoting the oral answer which was given. This was a most extraordinary procedure as was the inquiry which the court submitted to counsel. The fact that there was evidence from which the jury might infer a wilful violation of the act, would certainly not justify this court in exercising the functions of the jury. While it may be conceded that appellant did not respond to the induction notice, he testified that this was on account of the fact that he understood, by reason of a purported conversation between his wife and a Naval officer, that he had been further deferred, and also because he had read newspaper accounts of changes in the draft law which led him to believe that men of his age were not subject to draft. (Tr. p. 52, Appellant's Opening Brief p. 3.) The question of whether, in view of this evidence, appellant's failure to report was or was not wilful was then a question for the jury and, since the telegram expressly referred to this feature of the case, its effect was clearly and plainly prejudicial.

The opinion of the court holds this to be harmless error "in view of such evidence, uncontradicted by appellant, who took the stand, as his deliberate tearing up of his order to report in the office of his Selective Service Board." This is not a correct statement of the evidence. The record shows that the clerk of the draft board testified that on April 27, 1944, the defendant came into her office with his classification card and told her that he would not report for induction and tore up the classifica-

tion card. (Tr. pp. 43 and 44.) This was not the order to report as stated in the opinion of the court. Be that as it may, however, he was not required by the order to report until May 13, 1944, which was over two weeks subsequent to the happening referred to in the court's opinion. While it may be true that the evidence of the clerk of the draft board as to appellant's behavior on April 27 was sufficient to justify the jury in finding a wilful violation, nevertheless there was evidence to the contrary and it was the function of the jury and not this court to pass upon the question of wilfulness. If the telegram was erroneously received in evidence, which this court assumed to be the fact for the purpose of its decision, then, in effect, the evidence of appellant upon the question of wilfulness was controverted (a) by the testimony of the clerk of the draft board referred to in the opinion and (b) by this telegram. For the court to say that this was harmless error because there was sufficient evidence to support the jury's verdict, even though the document erroneously admitted went directly to the question in issue, seems without any justification. Certainly no authorities are cited to support such a conclusion, and no argument to this effect was made by the district attorney. The Constitution protects those charged with crime in federal courts from being compelled to incriminate themselves. Appellants denied that he sent this telegram. To allow hearsay testimony of this character, which was not identified and which purported to amount to a confession of guilt by the appellant upon the only issue in controversy, was a plain violataion of the Constitution, and this is not met by the observation that appellant's attorney admitted

that there was sufficient evidence outside of the telegram to sustain the verdict, or the observation of the court that, because certain evidence was properly admitted and this sustained the verdict, then the doors were open for all hearsay and prejudical evidence to be admitted.

We have not had time to brief the authorities upon this, but, if a rehearing is granted, they will be further examined. We call the attention of the court, however, to the very well considered opinion of Associate Justice Rutledge, reported in *Wood v. U. S.*, 128 F. (2d) 265, 141 A.L.R. 1318. In that case the defendant, on a preliminary examination before an examining magistrate, had stated that he was guilty. Later he pled not guilty when arraigned. At the trial his admission of guilt before the examining magistrate was received in evidence. The court reversed the case, both because the lower court admitted evidence of the plea on arraignment, and also the plea at the preliminary hearing, since the plea at the arraignment had been withdrawn. The reason given was that this was indirectly compelling the defendants to testify against themselves.

The decision of this court, we contend, is squarely in conflict with the decision of the Supreme Court of the United States in *Malinski v. N. Y.*, 65 Sup. Ct. Rep. 781, decided March 26, 1945. The question before the court in that case was whether certain coerced confessions should have been received in evidence. In considering this, the court said:

> "If all the attendant circumstances indicate

that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, page 154, of 322 U. S., page 926, of 64 S. Ct., 88 L. Ed. 1192. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S., 596, 597, 64 S. Ct. 1208, 1210, 88 L. Ed. 1481."

The above quotation seems to fit squarely and answer the opinion of this court. In this court's opinion, it is, in effect, said that, as long as there was evidence apart from the telegram to sustain the verdict, then it was harmless error to receive the telegram. The Supreme Court of the United States upon the contrary has held that a confession which is illegally received will require reversal of a judgment of conviction even though there be sufficient evidence apart from it to sustain the conviction. Se also the decision of the Circuit Court of Appeals of the Eighth Circuit in *Bayless v U. S.*, first reported in 147 F. (2d) 169, which was prior to the handing down of the *Malinski* case, and thereafter on rehearing in 150 F. (2d) 236, where a different conclusion was reached.

This court is in exactly the same position as was the Circuit Court of Appeals of the Eighth Circuit in the *Bayless* case, and it should therefore grant a rehearing and, upon such rehearing, set this judgment aside.

Respectfully submitted,

S. J. O'BRIEN.